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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

Nos. 185-186

ANCHOR SERUM COMPANY, a corporation of Missouri,
vs. *Petitioner*,

AMERICAN COOPERATIVE SERUM ASSOCIATION,
a corporation of Iowa,
Respondent.

ILLINOIS FARM BUREAU SERUM ASSOCIATION,
a corporation of Illinois,
Petitioner,
vs.

AMERICAN COOPERATIVE SERUM ASSOCIATION,
a corporation of Iowa,
Respondent.

Petition of Illinois Farm Bureau Serum Association for
Rehearing of Petition for Writs of Certiorari to the
United States Circuit Court of Appeals, for the Seventh
Circuit.

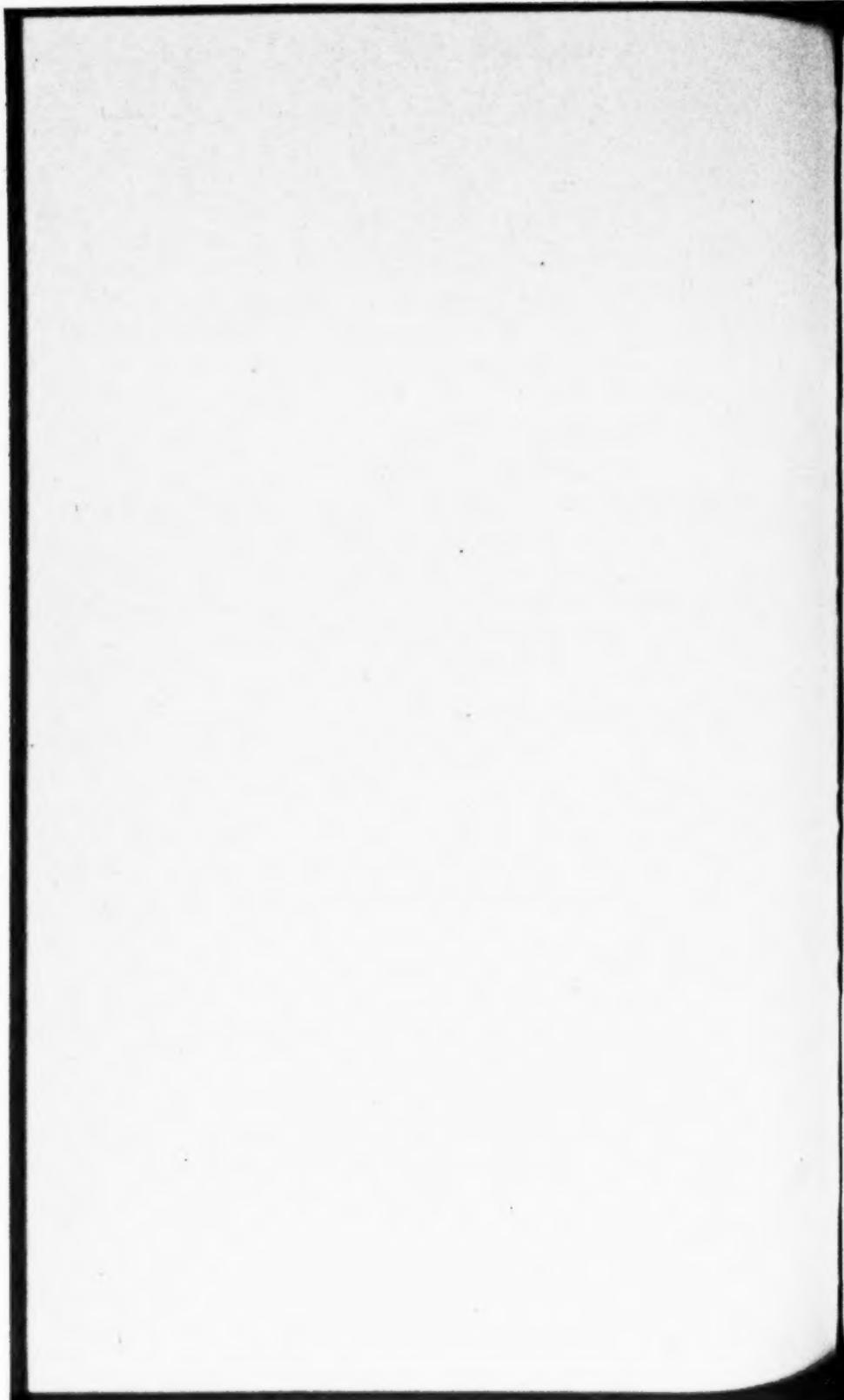
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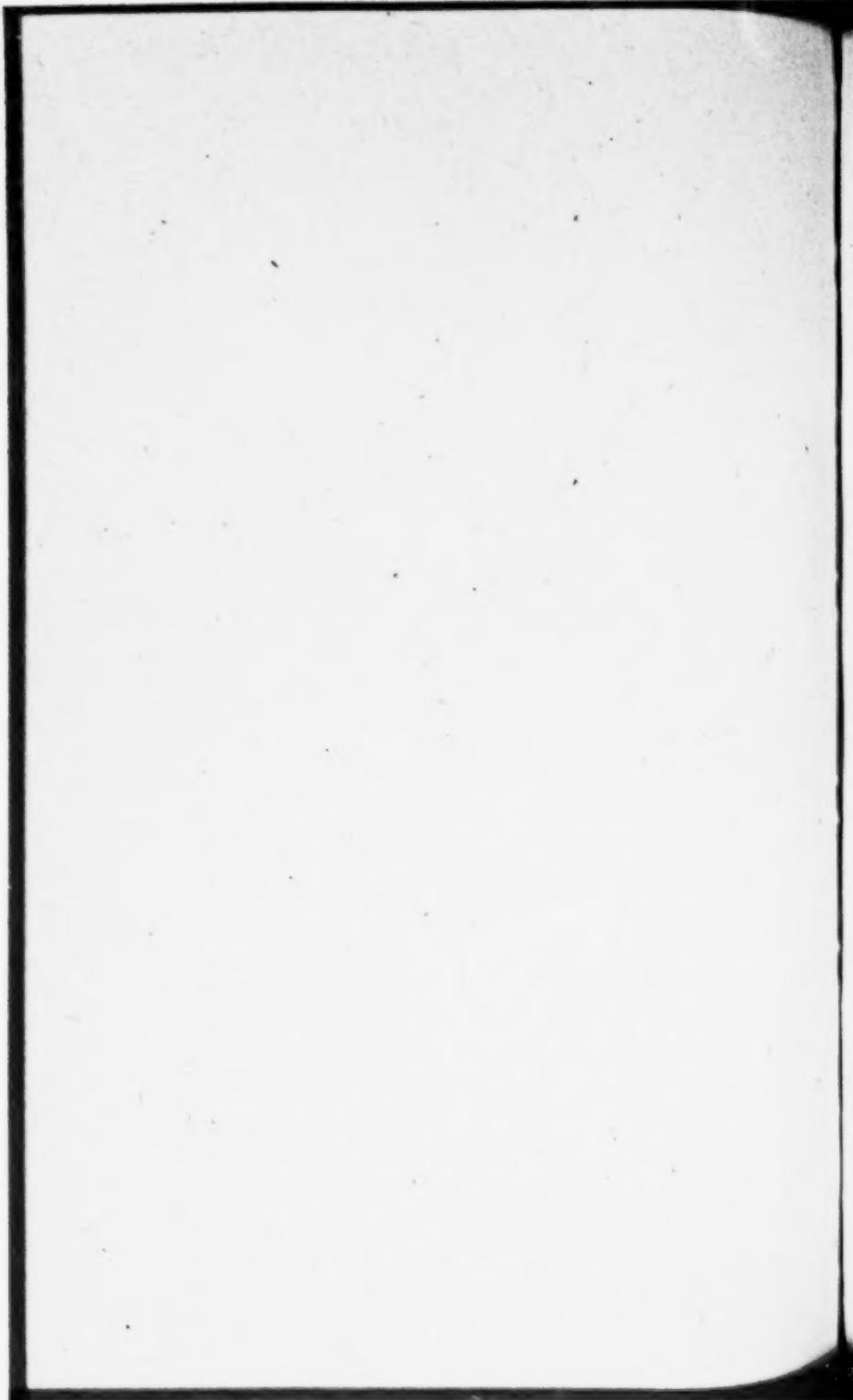


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United States Circuit Court of Appeals, for the Seventh
Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

STATEMENT.

This is a petition for rehearing of a joint petition for
writs of certiorari, filed by this petitioner and petitioner
Anchor Serum Company, which was denied on October 14,
1946.

This denial of petition for writ of certiorari has deprived this petitioner of its constitutional right to a trial by jury. Petitioner cannot believe that this Court has fully considered this particular effect of its order of denial. There were seven questions presented in the original petition and we fear that this Court has entered its order of denial upon the basis of its opinion with respect to what it may have considered the more important questions presented.

Effect of Denial.

The effect of this order of denial is a complete reversal of the great body of the law relating to right of trial by jury in suits under the Anti-trust Laws and to allow an unprecedented decision in this respect to become the law of the land. This, we think, this Court did not intend.

Proceedings in Courts Below.

This was an action brought by respondent in the District Court of the United States to recover triple damages for alleged violations of the Anti-trust Laws. (R. 63 to 69, inclusive; R. 2 to 11, inclusive.) The case was tried before a jury and the jury returned a verdict finding the petitioner and Anchor Serum Company not guilty of damaging the respondent. (R. 1163.) The District Court judge set aside this verdict and did not simply order a new trial, but entered judgment for the respondent in an aggregate amount of \$20,166.10. (R. 641, 1165, 1166.) The Circuit Court of Appeals for the Seventh Circuit (one judge dissenting) affirmed the District Court but did reduce the amount of the judgment to \$13,347.93 plus attorney's fees (\$2,500.00 having been allowed by the District Court). (R. 1247 to 1269, inclusive.)

Reasons Relied Upon for Rehearing.

This court has said in *Fleitmann v. Welsbach Street Lighting Company*, 240 U. S. 27, 60 L. Ed. 505, where an action was brought to recover triple damages under the Sherman Act:

“* * * When a penalty of triple damages is sought to be inflicted, the statute should not be read as attempting to authorize liability to be enforced otherwise than through a verdict of a jury in a court of common law. On the contrary, it plainly provides the latter remedy, and it provides no other. * * *” (Page 29, 240 U. S.; page 507, 60 L. Ed.)

There were many questions of fact at issue in this case. The question of whether this petitioner had knowledge that the allowances it received were discriminatory; the question of whether the respondent was actually in competition with petitioner; the question of whether the respondent was compelled to reduce its prices or was in any way damaged by the acts complained of—to mention only a few—were vital and important questions for determination by a jury. Yet 20,000 farmers (Tr. 403) in the State of Illinois, organized into a non-profit agricultural co-operative association (Tr. 392, 719 to 722, inclusive) find themselves ordered to pay a money judgment for triple damages under the Anti-trust Laws to a party that a common law jury says has not been damaged. (R. 1163.) The cooperative association owned by these farmers has not had any issue of fact decided against it by a jury but a Federal District judge has taken all fact questions from the jury (with a Federal Circuit Court of Appeals in a divided opinion affirming) without regard to the right of petitioner under the 7th Amendment to the Constitution of the United States to have questions of fact tried by a jury.

An exhaustive search of decisions reveals no case where a judgment for a plaintiff for unliquidated damages under the anti-trust laws has ever been permitted to stand when entered contrary to and notwithstanding the verdict of a jury for a defendant. In such cases where the verdict has been for the defendant, the power of the Court would seem to be limited to the awarding of a new trial.

The right to trial by jury is one of the oldest concepts of personal liberty in our system of general jurisprudence. It is a basic and fundamental feature of our system of federal jurisprudence. It is a right so fundamental and sacred to the citizen that this Court has always guarded it with jealousy. These propositions are so elemental that they require no supporting citations.

In this case there is a patent difference of opinion between reasonable men as to the effect of the evidence and the inferences to be drawn therefrom. One judge of the Circuit Court of Appeals for the Seventh Circuit has written an opinion stating that in this case a verdict should have been directed for this petitioner and Anchor Serum Company and at the least the verdict of the jury should have been accepted. (153 Fed. (2d) 915 to 918, R. 1259 to 1267.)

We respectfully submit that the denial to petitioner of its constitutional right to trial by jury is of gravity and general importance and that in affirming the judgment of the District Court the Circuit Court of Appeals has sanctioned a departure so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The decision of the Circuit Court of Appeals has already attracted widespread attention. Requests have been received by counsel from law schools, publishers of law reviews and attorneys specializing in anti-trust law for copies of our briefs and copies of the record.

If the decision of the Circuit Court of Appeals for the Seventh Circuit is permitted to become law it can only mean that from this day forward defendants in actions for triple damages under the anti-trust laws as well as in other tort actions have only a phantom right under the Constitution to trial by jury or that such right may be nullified and denied by any judge who chooses to disagree with the findings of the jury and arbitrarily enter judgment for the plaintiff notwithstanding the verdict of the jury. It must mean this, for this is precisely the effect of the decision of the Circuit Court of Appeals in this case. This is something new in American jurisprudence and a grave encroachment upon the constitutional rights of our people.

Conclusion.

We still earnestly believe that the other questions presented in the original petition for writs of certiorari furnish adequate and sufficient reasons for granting the writs of certiorari, but for sake of emphasis upon the grave constitutional question referred to herein we forsake in this petition any further plea with respect to such questions.

We respectfully pray that this Court reconsider its denial of October 14, 1946, and grant the petition for writs of certiorari.

Respectfully submitted,

DONALD KIRKPATRICK,
PAUL E. MATHIAS,
HARRY MELOY.

I hereby certify that the foregoing petition is presented in good faith and not for delay.

PAUL E. MATHIAS.